garding the technical meaning of the term incumbrance. Where, however, the vendee has bought land for purposes of investing in the rents and profits of the estate, the presence of leaseholds is assumed to have been contemplated by the parties to the contract, and the covenant against incumbrances is not, therefore, held infringed.[15]

ENFORCEMENT OF ULTRA VIRES CONTRACTS.—Corporations are considered creatures of the law, having only such rights and powers as the legislature has conferred upon them.[1] According to the strict theorists, acts of a corporation beyond its charter limits are null in the eyes of the law, but theoretical concepts of corporations have frequently been forced to yield to practical expediency.[2] It has been asserted, on the other hand, that corporations have the power to exceed their charters just as individual persons can exceed their rights,[3] a contention that finds no small support in the universal liability of a corporation for its torts.[4] Yet even under the latter more liberal view, acts beyond the authorized limit are contrary to the law, and an illegal contract cannot be the basis of an action.[5] There would seem to be considerable logic with the Supreme Court, and the courts of last resort of many of the States of this country, in maintaining the strict doctrine of *ultra vires,* that a contract made by a corporation in excess of its granted powers is void.[6]

In opposition to the foregoing decisions, however, there is a large group typified by the recent case of *Seamless Pressed Steel, etc. Co.* v. *Monroe* (Ind. 1914) 106 N. E. 538, which reject the stricter theory to the extent of allowing a party who has performed his share of an *ultra vires* contract to recover on the contract itself.[7] It may be well to examine the theory on which this position depends. These courts do not classify contracts in excess of chartered powers with those against public policy, or in violation of positive statute, on which

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generally and rapidly appreciating; there land is capital, here it is a commodity; there its uses remain largely the same from generation to generation, here they are infinitely varied, and changeable with every new possessor." It is submitted that the nature of leaseholds in our large cities approximates more nearly to conditions in England than to conditions in other parts of the United States.

[15]See Rawle, Covenants for Title (5th ed.) 91, note; Hoover *v.* Chambers, *supra.*

[1]Thomas *v.* Railroad Co. (1879) 101 U. S. 71; 2 Kent, Comm., *298.

[2]Prof. I. M. Wormser, Piercing the Veil of Corporate Entity, 12 Columbia Law Rev., 496.

[3]2 Morawetz, Private Corporations, §§ 648, 649.

[4]Salt Lake City *v.* Hollister (1886) 118 U. S. 256; Bissell *v.* Michigan etc. R. R. (1860) 22 N. Y. 258.

[5]15 Columbia Law Rev., 175.

[6]Central Transportation Co. *v.* Pullman's etc. Co. (1891) 139 U. S. 24; First Nat. Bank *v.* American Nat. Bank (1903) 173 Mo. 153; see Leigh *v.* American Brake-Beam Co. (1903) 205 Ill. 147.

[7]Bath Gas Light Co. *v.* Claffy (1896) 151 N. Y. 24; McQuaig *v.* Gulf Naval Stores Co. (1908) 56 Fla. 505; see Eastman *v.* Parkinson (1907) 133 Wis. 375.

they allow no action,[8] and it might be inferred that they regard *ultra vires* as a matter for the State or stockholders only,[9] were it not for the fact that they treat it as a perfect defense where a contract is wholly executory.[10] An attempt is sometimes made to justify these decisions on the basis of estoppel,[11] but one cannot do by estoppel what the law forbids the doing of directly, and this explanation is usually rejected.[12] Even if the difficulty were overcome that all persons dealing with a corporation are bound to ascertain the limits of its corporate power so that the doctrine could be invoked in favor of an individual, it would clearly fail to explain those cases where the corporation itself is the plaintiff, for the corporation could not be deceived by the statements of another person as to its own powers. Attempts to found the doctrine of recovery in these cases on sound theory seem difficult, but the true explanation may be found in the feeling of the judges that it would be grossly unjust to allow one who has received the benefit of performance to avail himself of a technical defense to avoid his liability.[13] Yet it seems no great hardship to deprive a man of his contemplated profits provided he receives just compensation, and even those courts which refuse to give any vitality to the contract, allow recovery of an equitable nature for property delivered, or services rendered.[14] It must be admitted, however, that in exceptional cases recovery on the contract itself seems the only adequate remedy,[15] and this fact is the strongest support of the contention that public policy justifies a recovery on *ultra vires* contracts.

That public policy may modify theories of corporation law, is recognized even by the strict federal courts, which allow recovery

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[8]Penn *v.* Bornman (1882) 102 Ill. 523; Franklin Nat. Bank *v.* Whitehead (1898) 149 Ind. 560; Pratt *v.* Short (1880) 79 N. Y. 437.

[9]Eastman *v.* Parkinson, *supra*; Harris *v.* Independence Gas Co. (1907) 76 Kan. 750. It has been asserted that an *ultra vires* contract may be validated by ratification of the stockholders; Moore *v.* Moonell Co. (N. Y. 1899) 27 Misc. 235; but this doctrine is generally rejected. Savannah Ice Co. *v.* Canal etc. Co. (1913) 12 Ga. App. 818.

[10]Jemison *v.* Citizens' Sav. Bank (1890) 122 N. Y. 135.

[11]Auerbach *v.* LeSueur Mill Co. (1881) 28 Minn. 291; Vought *v.* Eastern etc. Assn. (1902) 172 N. Y. 508.

[12]National Home etc. Assn. *v.* Home Savings Bank (1899) 181 Ill. 35; Humbolt Mining Co. *v.* American Mfg. etc. Co. (C. C. A. 1894) 62 Fed. 356.

[13]See Wright *v.* Hughes (1889) 119 Ind. 324; Clark, Corporations, 182 *et seq.*

[14]Citizens' Nat. Bank *v.* Appleton (1910) 216 U. S. 196; U. S. Brewing Co. *v.* Dolese etc. Co. (1913) 259 Ill. 274; Ely *v.* Oakland Circuit Judge (1910) 162 Mich. 466. This recovery is sometimes given in an action for money had and received, White *v.* Franklin Bank (1839) 39 Mass. 181; Leigh *v.* American Brake-Beam Co., *supra*, and other times in an action for an accounting. Newcastle etc. Ry. *v.* Simpson (C. C. 1885) 23 Fed. 214; Boyd *v.* American Carbon Black Co. (1897) 182 Pa. 206.

[15]Chapman *v.* Iron Clad etc. Co. (1898) 62 N. J. L. 497. The defendant had contracted to hire the plaintiff if the plaintiff would buy stock in the defendant corporation, and agreed to buy back the stock when the plaintiff should be dismissed. The defendant, having dismissed the plaintiff, refused to perform. The court said that the contract was not *ultra vires*, but that if it had been the defense would have been inadmissible, since justice could be obtained only by enforcing the contract.

where the contract is within the general scope of corporate powers with which the other parties seem to be familiar, but is beyond the chartered powers in the particular circumstances of its performance, of which the other party can know nothing. This includes cases where a loan is in excess of the limit of indebtedness,[16] or the contract is for an unauthorized purpose.[17] Again, public policy requires that a *bona fide* holder for value of *ultra vires* commercial paper should be protected.[18] It is thus seen that public policy, even in the strictest jurisdictions, seems to take precedence, to some extent, over metaphysical reasons in the formulation of a doctrine of *ultra vires*. But if we accept the premise that corporation restrictions are for the benefit of the public generally,[19] we may well urge that public policy does not require the enforcement of *ultra vires* contracts, but rather forbids it as tending to encourage the abuse of corporate powers.

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[16]Connecticut etc. Bank *v.* Fiske (1880) 60 N. H. 363.

[17]Colorado Springs Co. *v.* American Pub. Co. (C. C. A. 1899) 97 Fed. 843.

[18]Credit Co. *v.* Howe Machine Co. (1886) 54 Conn. 357; Monument Nat. Bank *v.* Globe Works (1869) 101 Mass. 57; Auerbach *v.* LeSueur Mill Co., *supra*.

[19]See Pittsburg etc. Ry. *v.* Keokuk etc. Bridge Co. (1889) 131 U. S. 371, 384.